

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**LORAIN D. REX, Appellant**

**and**

**DEPARTMENT OF THE NAVY,  
BREMERTON, WA, Employer**

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**Docket No. 03-2267  
Issued: December 3, 2003**

*Lorain D. Rex, pro se  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

An appeal was filed with the Board on September 23, 2003 of two Office of Workers' Compensation Programs' decisions. On August 14, 2003 the Office denied appellant's claim for hearing loss on the basis that it was untimely filed. On September 8, 2003 the Office denied appellant's request for reconsideration without reaching the merits of the case. As the most recent merit decision in this case, August 14, 2003, was filed within one year, the Board has jurisdiction over the merits of the case, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issues on appeal are: (1) whether the Office properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Federal Employees' Compensation Act; and (2) whether the Office properly refused to open appellant's claim for further merit review.

## **FACTUAL HISTORY**

On April 3, 2003 appellant, then an 84-year-old retired ship fitter, filed an occupational disease claim (Form CA-2), alleging that he sustained a hearing loss in the performance of duty.<sup>1</sup> He indicated on the claim form that he first became aware of his condition and that it was work related on July 7, 1974.<sup>2</sup> Appellant provided audiograms and employment records in support of his claim.

In a letter dated May 12, 2003, the Office requested additional information regarding appellant's claim from the employing establishment and from appellant. The Office received handwritten responses and an annotation indicating that appellant's medical file was ordered from the archives, along with a note indicating that the employing establishment was unaware of notification of injury before April 3, 2003. On June 2, 2003 the Office received appellant's records consisting of audiograms, treatment records and work descriptions. On July 7, 2003 the Office received a typed response from Tom Reed indicating that appellant retired in 1974 and that his personnel records were no longer available. Mr. Reed indicated that appellant was exposed to hazardous noise during his 29-year career at the employing establishment, including noise from gunfire. He indicated that hearing protection was not taken as seriously back then as it was today.

By decision dated August 14, 2003, the Office denied compensation on the grounds that appellant had not filed his claim in a timely manner as required by the Act.<sup>3</sup> The Office noted that appellant was aware of his claimed condition on July 7, 1974 and that he had provided no evidence that his immediate supervisor had actual knowledge of any hearing loss within 48 hours of the date of injury.

By letter dated August 28, 2003, appellant requested reconsideration noting that he had worked for the employing establishment for many years and sustained several injuries that included hernias. He indicated that he was not notified that he could file for hearing aids and compensation and that, when he retired, the dispensary said he had a hearing loss but did not notify him that he could or should apply for hearing aids. Appellant indicated that the reason for his application for assistance at this time was that he spoke with a former coworker who had recently received hearing aids, batteries and compensation.

By decision dated September 8, 2003, the Office denied appellant's request for reconsideration without reaching the merits.

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<sup>1</sup> In response to the question as to why his claim was not filed within 30 days after the date he first realized his disease or illness was caused or aggravated by his employment, appellant stated that he did not know he could file a claim.

<sup>2</sup> The record reflects that appellant retired on July 12, 1974.

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

### **LEGAL PRECEDENT-Issue 1**

In cases of injury prior to September 7, 1974, a claim for compensation must be filed within one year of the date that claimant was aware or reasonably should have been aware that the condition may have been caused by the employment factors.<sup>4</sup> The one-year filing requirement may be waived if the claim is filed within five years and (1) it is found that such failure was due to circumstances beyond the control of the person claiming benefits; or (2) that such person has shown sufficient cause or reason in explanation thereof and material prejudice to the interest of the United States has not resulted from such failure.<sup>5</sup>

The test for whether sufficient cause or reason was shown to justify waiver of the one-year time limitation is whether a claimant prosecuted the claim with that degree of diligence which an ordinary prudent person would have exercised in protecting his right under the same or similar circumstances.<sup>6</sup> The five-year time limitation is a maximum mandatory period, which neither the Office nor the Board has the power to waive.<sup>7</sup>

In addition, for injuries occurring between December 7, 1940 and September 6, 1974, Office procedures provide that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act,<sup>8</sup> but that this requirement will be waived if the employee filed written notice within one year after the injury or if the immediate superior had actual knowledge of the injury within 48 hours after the occurrence of the injury.<sup>9</sup>

In an occupational disease claim, the time limitation does not begin to run until the claimant is aware, or reasonably should be aware, of the causal relationship between his employment and the compensable disability. If exposure to implicated employment factors extends beyond the date of such awareness, the time limitation begins to run on the date of last exposure.<sup>10</sup>

### **ANALYSIS-Issue 1**

Appellant stated on his April 3, 2003 claim form that he first became aware of his hearing loss and its relationship to his employment in 1974. The employing establishment indicated that appellant retired on July 12, 1974. Therefore, the Board finds that appellant had knowledge of

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<sup>4</sup> *Eugene L. Turchin*, 48 ECAB 391, 395 (1997).

<sup>5</sup> *Edward Lewis Maslowski*, 42 ECAB 839 (1991); *Dorothy L. Sidwell*, 36 ECAB 699, 706 (1985).

<sup>6</sup> *Roseanne S. Allexenberg*, 47 ECAB 498, 500 (1996).

<sup>7</sup> *Albert K. Tsutsui*, 44 ECAB 1004, 1008 (1993).

<sup>8</sup> 5 U.S.C. § 8119(b).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Time*, Chapter 2 801.3.b.1 (March 1993).

<sup>10</sup> See *Peter S. Elliott*, 51 ECAB 627 (2000).

his hearing loss and its possible work relationship by July 7, 1974 and the time limitation period began to run as of July 12, 1974 the date of appellant's last exposure to the implicated work factors. However, appellant did not file his claim until April 3, 2003. Therefore, his claim was clearly outside the one-year limitation period. Appellant is not entitled to waiver of the one-year filing requirement because his claim was not filed within five years of the claimed hearing loss, nor has he met any of the other requirements for such waiver.

Appellant's claimed injury date of July 12, 1974 falls into the category of injuries occurring between December 7, 1940 and September 6, 1974, in which the Office procedure manual indicates that written notice of the injury should be given within 48 hours as specified in section 8119 of the Act.<sup>11</sup> There is, however, no evidence that appellant filed written notice within one year after the injury as specified in section 8119. Moreover, the record is devoid of any evidence that appellant's immediate supervisor had actual knowledge of any hearing loss within 48 hours after its occurrence. Consequently, appellant has not established that his claim was filed within the applicable time limitation provisions of the Act. The Board has held that neither the failure of the employing establishment to assist in filing for compensation nor ignorance that a disability is compensable is sufficient cause for waiving the one-year limitation.<sup>12</sup>

### **LEGAL PRECEDENT-Issue 2**

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>13</sup> Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>14</sup> The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>15</sup> Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.<sup>16</sup>

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<sup>11</sup> 5 U.S.C. § 8119(b).

<sup>12</sup> *Cecile Cormier*, 48 ECAB 436 (1997).

<sup>13</sup> 5 U.S.C. § 8128(a) ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

<sup>14</sup> 20 C.F.R. § 10.608(a).

<sup>15</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>16</sup> 20 C.F.R. § 10.608(b).

### **ANALYSIS-Issue 2**

In support of his request for reconsideration, appellant contended that he sustained several injuries while working for the employing establishment and that he was unaware that he could file for hearing aids and compensation. Appellant did not provide any evidence to address the relevant issue in this case of whether his claim was timely filed or that his supervisor had actual knowledge of his exposure within 48 hours after the occurrence of the injury. The Board finds that appellant's arguments are not relevant to the underlying issue in this case and do not constitute a basis for reopening a case.<sup>17</sup> Appellant has failed to show that the Office erred in interpreting the law and regulations governing schedule awards under the Act and has not advanced any relevant legal argument not previously considered by the Office. Furthermore, he did not submit relevant and pertinent new evidence. Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request.<sup>18</sup>

### **CONCLUSION**

The Board finds that the Office properly denied appellant's compensation claim on the grounds that he did not establish that his claim was filed within the applicable time limitation provisions of the Act and the Office properly refused to open appellant's claim for merit review.

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<sup>17</sup> *James R. Bell*, 52 ECAB 414 (2001).

<sup>18</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERD THAT** the September 8 and August 14, 2003 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Issued: December 3, 2003  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member